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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, *Petitioner*,

vs.

OVETA CULP HOBBY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE.

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Amicus Curiae,
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INTEREST OF AMICUS

The American Civil Liberties Union is gravely concerned over the alarming extent to which the suppression of basic liberties and the corruption of historic safeguards have replaced legitimate police and judicial procedures required to safeguard the security of the country. We therefore

stand against guilt by association, judgment by accusation, the invasion of the privacy of personal opinions and beliefs and the confusion of dissent with disloyalty—all of which are characteristic of the totalitarian tyrannies we abhor. The abuse by wrongful un-American methods of the rightful national aim to safeguard the security of the country not only betrays the noblest traditions of our history but also impairs the capacity for leadership of free peoples at this crucial time for freedom in the world.

Civil liberties, born of centuries of the people's struggle for dignity and freedom, are a basic part of man's heritage. Freedom of religion, thought, communication, assembly, dissent, freedom from discrimination, and the right to due process of law are highly prized parts of the American heritage.

We are interested in this case because we believe that the "hearing" afforded Petitioner in the administrative proceedings below was a sham hearing only. We believe that the decision of the Court of Appeals below must be reversed for the following reasons:

1) Reliance by the Loyalty Board upon confidential information, the nature, substance and source of which was undisclosed to petitioner, was a denial of due process of law required by the Fifth Amendment to the United States Constitution;

2) Failure to permit petitioner to confront and cross-examine "informants" who supplied adverse information or who testified *in camera* before the Loyalty Board violated that essential fairness which due process demands in administrative proceedings;

3) A continuation of the present procedures is an ever-mounting danger to the national security, requiring a finding that such procedures are violative of due process of law become unreasonable, when the procedures use the secret testimony of the "faceless informer."

INTRODUCTION

The case at bar does not involve the rights of Communist Party members;* it involves the right of an American citizen not to be branded as disloyal by his government without a due process hearing. While we believe that it is important in the interests of the national security to ferret out those who, either intentionally or inadvertently, could endanger our national security in "sensitive positions," a loyalty (or security) program applied to non-sensitive positions presents a danger to our traditions, our freedoms, our security itself.

The issues in this case are the very same as those involved in *Bailey* v. *Richardson*, 182 F. 2d 46, aff'd. by an equally divided Supreme Court, 341 U. S. 918.

The impact of this Court's affirmance of the *Bailey* case on large segments of our economic, political and social life cannot be discounted.

Government employees are not the only ones directly affected, however. Also involved are State and City civil servants,[1] merchant seamen,[2] United States citizens employed as international civil servants,[3] young men inducted

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*In considering the rights of members of the Communist Party, the American Civil Liberties Union recognizes that problems have arisen because of the dual nature of the Communist movement. It is both a political agitational movement and a part of the Soviet conspiracy. Insofar as it is the first, its members have all the rights of members of other parties; to the extent that it is the second, its members may in some particulars be restricted by law. The ACLU has recognized this distinction in positions it has taken in the past with respect to various laws and governmental actions affecting totalitarian movements—Fascist, Ku Klux Klan as well as Communist—and will continue to do so in the future.

[1] *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485.

[2] Brown & Fassett, "*Security Tests For Maritime Workers: Due Process Under The Port Security Program*," 62 Yale L.J. 1163; *Parker* v. *Lester*, (N.D. Calif., S.D.), 112 F. Supp. 433.

[3] Executive Order No. 10422, 18 Fed. Reg. 239 (1953), as amended by Executive Order No. 10459, 18 Fed. Reg. 3183 (1953).

into the Armed Forces under the Selective Service System,[4] government contractors and their millions of employees,[5] scientists,[6] teachers and professors in our schools and universities,[7] and applicants for admission to various professions.[8]

Indeed, another crisis such as the Korean War, may mean a loyalty-security program for the employees of power plants, steel mills, railroads, or any number of other vital industries. The constitutional issues involved in this proceeding therefore, may affect, in vital measure, the thinking and lives of a vast majority of our citizens.

THE ISSUE

The question before this Court is whether or not an employee holding a non-sensitive, non-policy-making position in a non-sensitive agency of the Federal government is entitled to know the nature, source and substance of the charges against him and an opportunity to confront and cross-examine adverse witnesses, in a proceeding to discharge him from employment on the alleged ground that there is a "reasonable doubt" as to his loyalty.

Inasmuch as the legal and constitutional issues are ably and fully dealt with in petitioner's brief, we believe it unnecessary to burden this court with a repetition of those arguments. Accordingly, our brief will demonstrate the

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[4] Army Regulations: AR 615-370, effective December 6, 1950; S. R. 600-220-1, effective June 18, 1954; Air Force Regulation 35-62, effective March 1, 1954.

[5] Munitions Board, Industrial Security Manual For Safeguarding Classified Security Information, (Dept. Def. 1951); Comment, "*Loyalty and Private Employment: The right of Employers to Discharge Suspected Subversives,*" 62 Yale L.J. 954.

[6] Atomic Energy Act, 60 Stat. 767 (1946), 42 U.S.C., Sec. 1810(b)(5), (B) (ii) (1946); Gelhorn, "*Security, Loyalty and Science,*" Cornell University Press, (New York, 1950).

[7] *Adler* v. *Board of Education*, 342 U. S. 485.

[8] Brown & Fassett, "*Loyalty Tests For Admission To The Bar,*" 20 U. of Chi. L. Rev. 480.

practical effect of the denial of "procedural due process" on those who have been involved in loyalty-security proceedings. We believe that a demonstration of actual instances of proven injustice and false and fantastic accusations against individuals who have been involved in these situations will enable the Court to evaluate the real meaning of the issues posed by this case.

POINT I

Reliance by the Loyalty Board Upon Confidential Information, the Nature, Substance and Source of Which Was Undisclosed to Petitioner, Is a Denial of Due Process of Law.

The Loyalty Board's consideration of secret evidence, the nature, substance and source of which was undisclosed to petitioner in this case is the rule and not the exception in loyalty-security proceedings. Wholly apart from the question of the right to confront and cross-examine adverse witnesses, loyalty and security boards rely to a large measure on so-called "confidential" information which is gathered by the Federal Bureau of Investigation and other investigative agencies in the regular course of their operations.[9]

The case of *"Charles B. Smith"* an important official of the United Nations Secretariat,[10] is an excellent example.

In the *Smith case*, respondent was alleged to have been employed by the now defunct San Francisco School of

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[9] *Departments of State, Justice, Commerce and the Judiciary Appropriations for 1951*, Hearings, subcommittee of the Committee on Appropriations, Senate, 81st Cong., 2nd Sess. (1950), pp. 136-137.

[10] *"Charles B. Smith"*, *Respondent* v. *International Organizations Employees Loyalty Board*, *"Hearing,"* Dec. 14, 1953, New York, N. Y., resulting in a determination on Jan. 26, 1954 of "no reasonable doubt as to the loyalty of [Charles B. Smith] to the Government of the United States." The name "Charles B. Smith" is fictitious. The true name will be supplied to the Clerk of the Court on request.

Social Studies from 1934 to 1940, under the supervision of Alexander Meiklejohn and that:

> "Information has been received by the Commission to the effect that the School of Social Studies at San Francisco, was actively engaged in the promulgation and dissemination of Communist propaganda; that the interrogation of prospective students by this school reflected that this institution was anxious to acquire pupils inclined to Marxist philosophy * * *" (*Charles B. Smith,* Interrogatory No. VII, *International Organization Employees Loyalty Board,* Oct. 9, 1953).

A request for the source of this accusation was refused but after an exhaustive independent investigation by Smith's attorneys, the charge was found to be based on a verified complaint in a law suit commenced in 1938, in the courts of California, entitled *"Ivan Francis Cox* v. *13th District of the Communist Party, et al."* (Complaint No. 278084, San Francisco County, as amended January 20, 1938) wherein it was alleged:

> "That the said sponsors and directors of the said San Francisco School of Social Studies have conspired and confederated together to keep from the public press of the City of San Francisco and the State of California, the true facts surrounding the enunciated purposes and aims of said school, and have otherwise by devious and diverse means attempted to use influence and pressure on several individuals and persons on numerous and sundry occasions with the object and purpose of hiding and concealing the fact that the said San Francisco School of Social Studies is, in reality, a training school for adult organizers of the Communist Party of the United States, and, more particularly the 13th District of said Communist Party, with headquarters at No. 121 Haight Street, San Francisco, California."

In dropping the law suit seven months later, Cox stated, under oath on September 2, 1938, that the suit was instituted in order to "smear" every prominent person in the

State of California, including all the Regents of the University of California, that he had been "duped" by a private detective then "wanted" on a warrant for assault, and the detective's attorney (thereafter censured by the California Bar Association); that he knew nothing about the San Francisco School of Social Studies and was induced to commit perjury by the detective and his lawyer.[11] The law suit was then dismissed by the California courts *with prejudice.*

This was the source of the information that branded the "San Francisco School of Social Studies" as "actively engaged in the promulgation and dissemination of Communist propaganda" when it has been recognized by leading educators as one of our most successful early experiments in adult education and that it had no association with any political or economic group whatsoever (Cf. Powell, *"Education for Maturity,"* Hermitage Press, (New York, 1949)).

The source of the information upon which Interrogatory VII in the Smith case was heard was not disclosed to Mr. "Smith" and was not known to the members of the International Organizations Employees Loyalty Board, even though it could in no way be considered "secret," (*United States* v. *Heine* (2 Cir.) 151 F. 2d 813). Fortunately, it was shown to be a complete fraud and hoax; but what would the result have been, if the source of the Charge had not been discovered by Smith's attorneys? What weight would the Loyalty Board have given to Charge VII, which was part of "all the evidence" upon which the Board was authorized to make a determination?

Not so fortunate was *Robert Fulton Waldeck*,[12] a former medical photographer in a Veterans' Administration Hos-

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[11] *"Duped By 'Red Hunt' Suit, Ivan Cox Charges. Defendants Not Served. Trial Unset. Whole Action Designed Apparently To Smear People He Claims,"* San Francisco "Chronicle", August 29, 1938; San Francisco "Examiner", August 29, 1938.

[12] *Waldeck* v. *Higley, et al,* (U.S.D.C., D.C.) Civil Action No. 4698-1954, now pending.

pital in Memphis, Tennessee. Although this employee had no access to classified material and was not in a policy-making position, he was suspended as a "security risk." Charge 3 of the Statement of Charges against him was:

> ". . . association with persons who were members of or affiliated with the Communist Party during the years 1938 and 1939, through your affiliation with the American Labor Party. The American Labor Party is referred to solely for the purpose of identification as to time, place and circumstances."

The employee asked for the names of the individuals allegedly involved in this allegation but was informed that the charge was "as specific and detailed as security considerations, including the need for the protection of confidential sources of information, permit." The employee testified that the only affiliation he had ever had with the American Labor Party was the fact of registration in New York elections in 1938 and 1939, that he had never attended a meeting of the American Labor Party, and that he had never been a member of the American Labor Party. In addition he submitted an affidavit from a former official of the American Labor Party which stated that the American Labor Party was controlled and dominated by anti-Communist trade-unionists until 1944, long after the employee stopped registering to vote "ALP." On October 7, 1954, the employee was informed that the charge was sustained "on the evidence of record," and that he was dismissed, effective October 12, 1954.

Ira S. "Stone," [13] a former employee of an engineering firm engaged in defense work, was accused, as was his wife, of expressing opinions in favor of Communism and having the reputation of being "pro-Communist." When Mr. Stone's attorneys asked that the Board inform them of the

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[13] Appeal of Ira S. "Stone", Case No. 54-800, now pending before the Appeal Division, Eastern Industrial Personnel Security Board. The name "Stone" is fictitious. The true name will be supplied to the Clerk of the Court on request.

nature and substance of the opinions allegedly expressed "in favor of Communism," and where and when Mr. Stone and his wife acquired a "pro-Communist" reputation, they were informed by the Board "that the disclosure of the requested information is either unauthorized or unnecessary."

The government's failure to disclose the nature, substance and source of secret evidence, wholly apart from the problem of confronting and cross-examining adverse witnesses, has resulted in the following farcial accusations levelled against individuals involved in loyalty-security proceedings:

In one case, an employee was accused of having been on the staff of the "Daily Worker;" investigation disclosed that the staff member of the Daily Worker achieved the same name as the Government employee only by the unfortunate coincidence of marriage (Bontecou, "*The Federal Loyalty-Security Program*," Cornell University Press, New York 1953, p. 83).

The same writer reports that a bachelor was formally accused of having a Communist wife (*supra*, p. 83); while another employee was accused of advocating the overthrow of capitalism by force and violence, an allegation which proved to relate to his socialist views in college days (*supra*, p. 105). Still another employee was challenged because of a letter he had drafted upon the orders of his superior—presumably on the theory that he had performed this duty in the interests of a foreign power (*supra*, p. 106).

Miss Bontecou reports the case of the individual, well known to friends as an active anti-Communist who had opened their eyes to "Party machinations" in labor unions and other organizations, who was accused of placing on his walls, banners emblazoned with the hammer and sicle on which appeared the slogan, "Workers Arise" (*supra*, at p. 113). Still another piece of nonsense, which would be funny were it not so serious, is the case of a man

charged as a Communist because some unidentified informant reported that he had Communist literature in his basement. The literature turned out to be a file of the "New Republic" (Joseph and Stewart Alsop, "*We Don't Want Loyal Numskulls,*" Washington Post, August 22, 1948).

Apart from the *Dorothy Bailey case,* the courts that have considered this issue had before them situations where the employees were employed either in "sensitive" agencies or "sensitive" jobs. Nevertheless, they have uniformly held that either "due process" of law or a statutory requirement necessitates that the employee be informed of the nature, source and complete substance of the derogatory information against him (*United States* v. *Gray,* (9 Cir), 207 F. 2d 237, 241-242; *Deak* v. *Pace,* 88 U. S. App. D. C. 50, 185 F. 2d 997; *Parker* v. *Lester,* (D. Calif.) 112 F. Supp. 433, 444; *Money* v. *Anderson* (denied cross-examination, employee successfully sued accusers for libel; discharge invalidated because charges insufficient to prepare defense, (D. C. Cir.) 208 F. 2d 34; *Manning* v. *Stevens,* (D. C. Cir.) 208 F. 2d 827).

Even under the Selective Service Act, where the issue involved the statutory inquiry of the Justice Department's advisory "auxiliary service" to Draft Boards in conscientious objector cases (cf. Brown & Fassett, "*Security Tests For Maritime Workers: Due Process Under The Port Security Program,*" 62 Yale L.J. 1163, 1194-1195), this Court held that the substance of the derogatory information must be disclosed (*United States* v. *Nugent,* 346 U. S. 1). The late Chief Justice's opinion, noted with approval (346 U. S., p. 6, n. 10), *United States* v. *Bouziden* (D. C. W. D. Okl.) 108 F. Supp. 395, also decided under the Selective Service Act, where the District Court stated (at p. 398):

> "The hearing officer must not be permitted to withhold unfavorable information gained during the inquiry, and giving no opportunity to rebut at the hear-

> ing, *then use this same unfavorable information as a basis for his adverse advisory recommendation.* If this is done the hearing itself becomes a sham and a farce."

Indeed, non-disclosure of confidential information in civil cases will be permitted only when it is clear that the safety of the nation will be adversely affected, (*United States* v. *Reynolds*, 345 U. S. 1, 7, 11).[14] And no less an authority on counter-espionage than General William J. Donovan, wartime head of the O.S.S., has stated:

> "While the Board's conclusion on the importance of protecting the investigatory work of the FBI appears justified, it does not follow that a Government employee must therefore be denied opportunity to be informed of the source of the evidence upon which the charges against him are based.
>
> "Certainly in practice much more could be disclosed to the employees than is currently disclosed. There seems no reason why the anonymous informant who is not in the regular employ of the FBI and whose testimony is relied on by the Board should not be revealed to the employee. It seems reasonable also that the Board should have the right to subpoena these informants. If non-confidential informants do not want to stand up and be counted, then their information should be used only as possible leads and not be made the basis of a record which cannot be refuted. And where it is impossible to reveal to the employee the *source* of the evidence against him, as in the case of confidential informants, the employee should at least be fully apprised of the *contents* of the testimony." (Donovan & Jones. "*Program For A Democratic Counter Attack to Communist Penetration Of Government Service*," 58 Yale L. J. 1211, 1234-1235).

Thus, wholly apart from the question of the right to confront and cross-examine adverse witnesses, the Loyalty

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[14] Compare rule on non-disclosure in Criminal cases: *United States* v. *Andolscheck* (2 Cir) 142 F. 2d 503; *United States* v. *Beckman* (2 Cir.) 155 F.2d. 580; *United States* v. *Coplon*, (2 Cir.) 185 F.2d. 629, 638.

Board's consideration of secret evidence, the nature, substance and source of which was unknown to petitioner, was completely unjustified and constituted a flagrant denial of "procedural due process of law."

POINT II

The Failure to Permit Petitioner to Confront and Cross-Examine "Confidential Informants" was a Violation of Procedural Due Process of Law.

Respondents' refusal to permit petitioner (holding a non-sensitive, non-policy-making position in a non-sensitive agency) to confront and cross-examine witnesses who testified against him was the result of the alleged need of preventing restriction of F.B.I. investigations (Donovan & Jones, *"Program For a Democratic Counter Attack to Communist Penetration of Government Service,"* 58 Yale L.J. 1211, 1234). Indeed, the Bureau is not authorized to obtain statements under oath and informants are assured that their identity will not be revealed, (Hoover, *"A Comment On The Article 'Loyalty Among Government Employees'"*, 58 Yale L.J. 401, 404-405).

The consequences of this policy have resulted in the following situations which actually occurred in loyalty-security proceedings:

Employee "A" was charged with being "pro-Russian" in his ideas. At the hearing, the informant who had furnished this information testified that he believed that "A" had "pro-Russian ideas" because he had said that unions were desirable things and that Negroes "were entitled to as much as anyone else," (Bontecou, *"The Federal Loyalty-Security Program," supra*, at pp. 127-130).

Employee "B" was charged with making the statement:

"I prefer the Communist form of government to that which we now have." At the hearing it developed:

> ". . . that the employee had been active in his local civic association and had decided to take some

courses in public speaking to help him in his organizational work. In connection with these activities he did a great deal of telephoning from the agency. When he began his course he discovered that the professor had selected communism as the topic around which the class exercises would center, chiefly because he thought it would be easy for the students to find current material on this subject. During the course the employee had clipped material on communism from the papers and had assembled on his desk relevant books from the department library. The material he gathered contained some of J. Edgar Hoover's strong anti-Communist speeches and statements. The fellow employees had noticed the subject matter of the collection, had understood him to say something on the telephone about 'the Communism we teach,' and had jumped to the conclusion that he was teaching communism to children in night school. This comedy of errors was completely cleared up through the testimony of all the witnesses at the hearing, including the informants. One of them repudiated the signed statement he had given to the FBI and denied that the employee had said, as reported, 'I prefer the Communist form of government to that which we now have.'" (Bontecou, "*The Federal Loyalty-Security Program*", *supra*, at p. 130).

Lloyd McBride",[15] a Navy Department civilian engineer, was accused of a sympathetic association with a woman identified as a former courier for a Soviet spy ring. This woman and McBride had lived in the same large apartment house in Washington, D. C., at about the same time.

On December 8, 1954, a confidential informant who had previously furnished this information to federal investigators testified before the Navy Department's Security Hearing Board *in camera*. The informant testified that McBride and the "former courier" were often together and

[15] Navy Department Security Hearing Board (Bureau of Ships), December 8, 9 and 10, 1954, Washington, D. C. The name "McBride" is fictitious; the true name will be supplied to the Clerk of the Court on request.

appeared to be quite friendly. Thereafter, McBride testified that he had never heard of the "former courier" prior to the receipt of the charges in his case, and from what he had recently learned of her description, had never even seen her. In the meantime, and largely through the efforts of the members of the Hearing Board, Board's Counsel, and the Board's Security Officer, the informant agreed to confront McBride at the hearing, testify in his presence, and be cross-examined by his counsel.

On December 10, 1954, the informant appeared at the hearing and identified herself as the manager of the apartment building in which McBride had resided. She testified, after seeing McBride and identifying him as the young man seated opposite her, that the information given to federal agents and her testimony before the Security Hearing Board *in camera* on December 8, 1954, was erroneous and mistaken; that in fact she had never seen McBride with the "former courier;" that she must have confused him with someone else; and that she knew nothing prejudicial or detrimental about McBride except that he and his roommate had invited Negroes to attend parties in their apartment.

In the case of *John Jones*,[16] a respected government employee with many years service, a co-worker informed the FBI that he had heard Jones express Communist ideas to another employee, and that Jones had told the informant that he was going to join a subversive organization.

At the hearing, on direct examination by members of the Security Hearing Board, it appeared that the only other witness to either of the alleged conversations was a third employee, since deceased, that the informant had never been displeased by anything Jones had done in their work together, and was simply doing his duty as a loyal citizen.

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[16] The name "John Jones" is fictitious. The employee does not wish his or his agency's name to be mentioned in this brief. It therefore cannot be furnished to the Clerk of the Court.

On cross-examination, however, the informant admitted that he could not recall the nature of the pro-Communist ideas expressed by Jones, except that he was positive that they were pro-Communist; that he did not know what Communism was, "except that it is a form of political party which threatens world supremacy and so on and so forth;" that he did not know what the Communist Party "line" in the United States had been from 1933 to 1954 on any issue; e.g., he did not know whether the Communist Party had been opposed to or in favor of the conviction of members of the Socialist Worker's Party in 1941; whether the Communist Party had been opposed to or in favor of the candidacy of Franklin D. Roosevelt for the Presidency in 1936; whether the Communist Party was opposed to or in favor of the United States' entry into World War II, either shortly before or shortly after June, 1941; and in answer to the question of Jones' counsel: "As a matter of fact, you don't know anything about Communism at all, do you?, the informant answered: "Except what I read in the newspapers."

The informant further testified that the subversive organization Jones had told him he was going to join was *Americans For Democratic Action*, and that an attorney-friend of the informant had told him that *Americans For Democratic Action* was "as Communist as Russia itself." Towards the close of the cross-examination, (after it had been developed that the informant had at one time been Jones' supervisor and that thereafter, Jones had advanced rapidly in grade, becoming the informant's supervisor), the informant admitted that on several occasions Jones had taken credit for the informant's work.

With respect to a similar situation, the Joint Committee on Atomic Energy has stated:

> "Case A serves as a warning that an informant may perhaps give the FBI highly unfavorable advice but when placed under oath before a local board deny all that he had said, admit that he knows little or nothing about the employee and admit further that he bore him

a grudge" (Report, *Investigation of U. S. Atomic Energy Commission*, 81st Cong., 1st Sess., (1949) at p. 68).

In the well-publicized *Chasanow case*,[17] the Navy Department, in an unprecedented and extremely commendable manner, reversed the "security risk" discharge of a career employee with 23 years service. The Navy Department's action occurred, however, only after the press had reported some of the fantastic happenings which resulted in Chasanow's dismissal. For example, on April 20, 1954, Anthony Lewis, feature writer for the Washington Daily News, reported in an article entitled "Gumshoes in Greenbelt":

> "George J. Panagoulis, police chief of Greenbelt and a graduate of the FBI school, was also visited by two ONI men.
>
> 'They had been all over Greenbelt,' he said. 'Their roamings, themselves, originated rumors. On the basis of my training and experience in investigative methods, I personally considered those two fellows to be rank amateurs in the field of security investigations.'
>
> "Several of the Greenbelt residents who are standing by Mr. Chasanow have made the serious charge that the ONI men tried to force one kind of testimony from them—testimony unfavorable to Mr. Chasanow.
>
> "'In their conversation they threw out various names,' said Charles T. McDonald, Greenbelt city manager, 'endeavoring to get me to verify that I had knowledge of Mr. Chasanow's close association with these people, I had no such knowledge.
>
> "'I explained thoroughly to them that Mr. Chasanow was an active interested citizen . . . The agents left somewhat disturbed that I had not given them the answers they had wanted.'"

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[17] Cf. Lewis, writing in the *Washington Daily News:*

"An Outcry from Greenbelt", April 15, 1954; "The Ordeal of Abraham Chasanow", April 16, 1954; "Inconsistencies and Ironies", April 19, 1954; "Gumshoes in Greenbelt", April 20, 1954; "Trouble in Greenbelt", April 21, 1954; "The Chasanows Look Ahead", April 22, 1954; "Chasanow Cleared and Returned to Job", September 1, 1954; "A Friend Brought Champagne", September 2, 1954.

"Mrs. McCamy said:

" 'They kept trying to put words in my mouth about a radical group at Greenbelt . . .' "

"Mrs. McCamy and Anthony Madden, another Greenbelt resident, were called to Mr. Chasanow's security hearing by the Navy. There the Navy representative, a Wave, asked them about the statements they had given the ONI, and both found—they said—that they had been completely misquoted by the ONI.

"This is Mr. Madden's account:

" 'Two ONI agents (had) asked me if Abe knew people whom they named, and I said that, Greenbelt being a small town, he undoubtedly knew most of them, just as I and practically everybody else in Greenbelt did.

" 'They asked me if he was friendly or associated with certain people they named who apparently were under suspicion. I said he was a very high type of person and friendly but associated only with the finest type of people in town.

" 'That is why I was surprised at the hearing when the Wave lieutenant said something to the effect that I was reported as having told the investigators that he associated wih some people who were under suspicion. I corrected this as a misunderstanding . . .' "

"Mrs. McCamy said the ONI men asked her about a great number of persons, including Mr. Chasanow. She said she answered that she didn't like many of them, though she knew nothing about their loyalty, but that in any case she 'wouldn't mention Abe Chasanow in the same breath with them'—she thought so highly of him.

" 'I found at the hearing I had been misquoted about Abe and another man,' she said. 'I told the board I had a dislike for the man over the sale of my house but had certainly not called him a communist or anything. That's why I was surprised—I hadn't said it.' "

As a result of this and other disclosures, the Navy Department re-investigated the case, and on September 1, 54, Chasanow was returned to work by the Navy Department with a public apology. Mr. Lewis, writing in the

Washington Daily News on that day, reported the following:

> "* * * Assistant Secretary of the Navy James H. Smith Jr., at a press conference attended also by Mr. Chasanow, said the case already has resulted in some changes of procedure in the Navy security program and further action is being contemplated. * * *
>
> "He said the case revealed the following flaws in the security program procedure: * * *
>
> "Anonymous informants, who made derogatory statements about Mr. Chasanow originally, failed to back up their charges when questioned about them.
>
> "Mr. Smith put greatest emphasis on this problem of anonymous accusers.
>
> "He said he is now 'looking into ways and means of preventing delivery of evidence which people are unwilling to stand up and back.'
>
> "He said he personally would favor requiring all such derogatory statements to be given under oath. (General Government policy on security matters bars such a procedure, however.)
>
> "Town leaders also said Navy investigators tried to force them to make unfavorable statements about Mr. Chasanow and then falsely reported the friendly comments they actually made.
>
> "When the anonymous informants were requisitioned, Mr. Smith said, their new statements made only two conclusions possible—they had changed their minds since the first interview or the original investigators had not reported their statements correctly.
>
> "Mr. Smith said he will look into the possibility of tking some punitive action against either the informants or the investigators. * * *"

In the *Waldeck case*,[18] the employee asked the Veterans Administration for a hearing in the New York City area, his home, inasmuch as his witnesses were unable to travel to the Veterans Administration Hospital at Memphis, Tennessee, the place originally scheduled for the hearing. The request for the change of venue was denied on the ground

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[18] See note 12, *supra*.

hat numerous witnesses for the government in the Mem-his area (all or most of them employees or former em-loyees of the Veterans Administration Hospital), had sig-ified an intention to testify at the hearing. When the mployee requested that the Board reconvene in New York ity after taking the testimony of the government witnesses n Memphis, in order to hear the employee's witnesses who esided in New York, the employee was informed that this rocedure was not authorized and his request denied.

The employee and his counsel then travelled to Memphis, ennessee. Immediately after the hearing commenced, the mployee was informed that he would not be permitted to onfront or cross-examine any witness, nor be informed of heir identities (although he knew who some of them were), ven though the agency regulations specifically provided hat the Hearing Board inform the employee of his right o cross-examine any witness offered in support of the harges and that the employee or his counsel would be ermitted to cross-examine all witnesses. The reason given or this action was that while each witness had stated that e would be happy to testify against the employee in pri-ate, all of them had informed the Board that they did not "desire" to testify in the employee's presence or be cross-examined by his counsel.

The Board justified its action by interpreting the Veter-ans Administration regulations (which provided that the mployee be informed of his right "to cross-examine any witness offered in support of the charges" and that "reason-able cross-examination of witnesses by the employee or his ounsel would be permitted"), to mean that the employee or his counsel was entitled to cross-examine only those "witnesses who appeared before the Board in his presence."

Thus, an employee who had been suspended from his job without pay, travelled from New York to Memphis, Ten-nessee, in the sole hope of proving that his continued em-ployment was no risk to the national security through the cross-examination of adverse witnesses, one of whom he

believed was a psycopathic liar, only to find that since no adverse witnesses "desired" to be cross-examined by his counsel, all he could do was deny under oath the charges against him.

In another case reported by the American Civil Liberties Union of Northern California in its September, 1954 issue of "American Civil Liberties Union—News", the following appears (pp. 1, 4);

> "Last month, a favorable decision was handed down in an extraordinary Atomic Energy Commission security case in which the Union had intervened. The case is of special interest because it reveals what prompted an informer to report the employee, a young scientist at the University of California Radiation Laboratory, to the FBI.
>
> "The informer is a school teacher and former clergyman. His connection with the case was disclosed when the employee sought to have him furnish an affidavit that he had no Communist sympathies and was not a security risk. The informer not only supplied the affidavit but, in doing so, revealed that it was he who had gone to the FBI with charges against the employee.
>
> *The Charges*
>
> "Those charges read as follows: It was reported that you have advocated the supremacy of Communism over Democracy as known in the United States; that you have damned the weaknesses of the United States and radically upheld the virtues of Communism. It was further reported that you have stated that the trouble with Americans is that they believe all the lies told against Russia; and that Russia is really a progressive, peace-loving nation.
>
> "A further charge was that the employee's wife had sought to telephone her father in Yugoslavia, on the occasion of her birthday. Also, during the course of the hearing the following charge was added: It has been reported that you are prone to make wild statements, and to express extreme views in order to

"show off", and that you reveal immaturity and instability in your talk and conduct.

"When counsel asked the Board to furnish him with the 'wild statements' that the employee had made, it was pointed out that the added charge merely asserted that the employee was 'prone' to make wild statements.

Informer Questioned by Board

"The Union sought unsuccessfully to induce the informer to testify at the hearing, but he declined to do so, and counsel reported the conversation to the security board. At a subsequent hearing, the informer appeared at the invitation of the AEC, but the employee and his counsel were not only denied the right of cross-examination but contrary to the regulations, they were not allowed to be present when the informer was examined.

The favorable decision was handed down about six months after the hearing in the case. However, because of the report made by the informer, it took about 2½ years before the employee was granted a clearance that permits him access to classified military information.

The Informer's Testimony

"A substantial part of the informer's testimony before the board follows:

* * *

A. * * * The only association of ideas there in my mind, and the thing that made me call up the FBI, very plainly speaking, and tell them I wished they would look into the matter, was the fact that at that time some men were working up there and were being questioned, or brought before the public press as stealing atomic secrets. I didn't want, S——, or any of those youngsters, to get involved in that kind of stuff.

I have been counseling youth since 1921.

* * *

A. When I came back down—this was a year ago last summer—when I came back down to Berkeley I just insisted that S—— sit down and talk the thing over, and face the facts, as I did a week or ten days ago, and we went into the matter of what he had said and done, and I admitted with him there was nothing subversive, or anything that would in any way impugn his integrity, but I thought he made a fool of himself. He said he thought so, too.

This is secret because, as a counselor of youth I am telling you something I wouldn't divulge to anyone else.

Q. Yes, this is confidential.

A. I said, "S——, the fact that you are willing to admit and face the fact that you talk like an academic youngster in college, instead of a mature young man, is a good thing and I accept that as full clearance as far as I am concerned of the character that I believed you had."

"Clean As A Hound's Tooth"

I told him in plain English that I had always trusted him. I knew him well and I was willing to come before this Committee and tell them, as far as his character was concerned, he was absolutely clean as a hound's tooth, and that there was not a thing that I would report, or could say that would in any way be detrimental to him. In fact this one characteristic of him being a loquacious youngster, listening to a lot of other people, and talking of generalities about the values of Russia, and Russian life, and Russian conduct, and some of our own weaknesses, did not involve or characterize him as in any way favorable to Communistic government or ideas.

I asked him if he belonged, years ago, to any group of Communists, and he said "No." I asked his friends about it. I asked a young lady with whom he went for a while, if she had found out anything in that regard, and she said it was her belief that R——, as we called him, had no affiliations with any Communistic group whatsoever."

In the 1951 case of Mary Black[19], the following charge was made to her: "You have been and still may be a member of, affiliated with, or sympathetically associated with the Communist Party, Communist Political Association, Communist Party, U.S.A., and the Socialist Workers Party." It was further specified that she had attended an open Socialist Workers Party meeting; had encouraged, approved, condoned, and defended her husband's activities on behalf of that Party; had closely associated with Communists and their sympathizers and had approved of their views and activities; had received Communist aid in getting position; had possessed and read with approval the literature of the Communist Party and the Socialist Workers Party.[20] The Veterans Administration voluntarily asked the only witness who had supplied this information to appear and testify. The following testimony of said witness appears in the Transcript of Hearing (P. 106, Veteran's Administration Loyalty Board, Cleveland, Ohio, July 16, 1951):

> "Q. In the time that you have known (Mary Black), you have never heard her say anything, nor seen her do anything, that would lead you to doubt her loyalty?
> "A. Never."

It further developed that the witness had had conversations totalling six hours with Mary Black in all his life.

Mary Black was cleared.

Perhaps the most striking illustration for the desperate needs for confrontation and cross-examination in these cases is to be found in the *"Smith" proceeding.*[21] In that case, "Smith" was charged, among other things, with having attended Communist Party meetings in 1935 and 1939.

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[19] The name Mary Black is fictitious; the true name will be reported to the Clerk of the Court on request.

[20] It should be noted in passing that the Communist Party and the Socialist Workers Party are bitter foes.

[21] See note 10, *supra.*

Inasmuch as counsel had already shown through documentary evidence that the other charges were false or irrelevant, the Hearing Board, displaying an extreme sense of fairness, attempted to secure permission from the FBI to release the informant's name in order to give Smith an opportunity to refute the accusation beyond mere denials. Two days before the hearing, Smith's counsel was informed tht the informant's name was Captain Charles G. Bakesy, and that the alleged Communist Party meeting in 1935 took place in Carmel, California, at the home of Ella Winter, then the wife of Lincoln Steffens.

During the hearing, the Board Chairman informed "Smith" that Bakesy, on a re-check by the FBI, had withdrawn the accusation that Smith had attended a Communist Party meeting in 1939, but affirmed his prior charge that Smith had attended a meeting in 1935 at the home of Ella Winter. The Board Chairman then asked Smith why Bakesy would make such a statement if it were not true. At this point, Smith's counsel asked the Chairman if he knew that Bakesy was a perjurer. When the Chairman said that he did not, and asked counsel if he had such information, counsel asked leave to ascertain what the facts were, and an opportunity to submit evidence on this issue was granted.

Four days later, documentary evidence was submitted that Captain Charles G. Bakesy was a professional witness[22] whose testimony on other occasions had been repeatedly and publicly rejected by government officials as incredible and unworthy of belief. Bakesy, who had offered to testify for a fee against Harry Bridges in the 1939 Bridges' deportation proceedings and whose offer had been refused by the West Coast Immigration Director, turned up at the hearing as a defense witness *for* Bridges. Dean Landis, the trial examiner in the Bridges case stated at p. 74 of

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[22] "San Francisco Examiner", August 18, 1939; "San Francisco Chronicle", August 18, 1939; Cf. Bailey, "*A Story Book Detective Takes the Stand*," San Francisco Examiner, August 18, 1939.

the "Findings And Conclusions Of The Trial Examiner," (a government document printed by the United States Printing Office):

> "Bakesy testified to other matters also, but his testimony need not be reviewed. Bakesy failed to carry conviction to the examiner. It is impossible to separate truth from fiction in his testimony. It was bizarre and at times fantastic. It seems best not to permit the testimony of either Captain or Mrs. Bakesy to play a real part in reaching such ultimate conclusions as must be reached in connection with the matters that are at issue in this proceeding."

If we assume, for the sake of argument only, that Captain Bakesy was one of the unidentified informants who testified in secret before the Loyalty Board in Petitioner's hearing in the case at bar, the absence of cross-examination and an opportunity to rebut a fantastic accusation made by him against Petitioner resulted in an incredible miscarriage of justice, completely abhorrent to every one of our traditional concepts of "fair-play." For all Petitioner knows, Captain Bakesy or someone just like him, either testified against him or otherwise supplied the information which resulted in the Loyalty Board's determination that Petitioner was disloyal.

The occasions in judicial history, even in systems in which hearsay evidence is permitted, where this sort of material has been considered as "evidence," are remembered today only as examples of the perversion of the principles of justice (cf. Pierre Dreyfus, "*The Dreyfus Case*," (Yale University Press, 1937 p. 26); *United States* v. *Joseph Alstoetter, et al*, Vol. III, War Crimes at Nuremberg ("The Justice Case") printed by the Government Printing Office, p. 1024).

This then, is the sorry record resulting from the alleged need of preventing restriction of FBI investigations; the justification being the "national security interest" involved in keeping the identity of confidential informants secret.

We respectfully submit that in the case of the employee holding a "non-sensitive," "non-policy making" position, there is neither necessity nor justification for withholding one iota of confidential information, or for refusing the employee the right to cross-examine each and every adverse witness. If the government would be embarrassed by such disclosure, the charge on which it is based should be withdrawn[23]—in the "non-sensitive" positions there is no need to tolerate an obliteration of the Constitution and the essence of fair procedures.

In "sensitive" jobs, which involve either access to classified material or other information important to national defense and foreign relations, or in "policy-making" positions in these areas, the professional or "under-cover" informant should be separated "from neighbors, maiden-aunts, and casual busybodies who have no legitim te reason for secrecy."[24] If it be claimed in answer to this simple solution that the private citizen would then be unwilling to supply testimony important to the safety of the nation, Congress has ample authority to give loyalty-security boards the power of *subpoena*.

Poorly drawn, slip-shod and politically expedient loyalty-security regulations do not sit well in answer to the documented claim that the fundamental liberties of so many people are fast becoming as extinct as the bison.

POINT III

The "Interests of National Security" Require a Reversal of the Decision Below.

Respondents assert that the interests of national security require this Court to affirm the decision below. While "Security is like liberty in that many are the crimes committed in its name," (Jackson, J. dissenting in *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, at

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[23] Cf. *United States* v. *Coplon* (2 Cir.) 185 F. 2d 629.

[24] Lewis, *Our Security Procedures Need Not Be Unfair*, "The Reporter," November 4, 1954, at p. 23.

p. 551), we respectfully submit that "it requires" this Court to reverse the decision below.

The issue before this Court is whether a federal employee in a non-sensitive job who is faced with a dismissal on loyalty (or security) grounds is entitled to procedural fairness, for it is in the web of the Board's procedures that our traditional liberties are being strangled. Indeed, some measure of the fairness of these procedures may be seen from the fact that of the 7,000 employees who have recently been separated from federal employment on "security" grounds, two out of every three resigned rather than contest the charges.[25]

The procedures of the present loyalty-security program, apart from imposing orthodoxy, stiffling expression and intellectual curiosity, have:

1. Disrupted and delayed the essential work of scientists in the field of secret research vital to the national defense.[26]

2. Caused scientists, engineers and technicians to go into unclassified and non-secret work, when there is a vital need for trained men in this field.[27]

3. Severely impaired federal employee morale and caused many responsible federal officials to resign in order to

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[25] (*New York Times* Oct. 17, 1954, p. 4E; *Cf.* Goldbloom, "*American Security and Freedom,*" a study sponsored by the American Jewish Committee, New York, 1954, p. 39; Hurst, "*How to be a Security Risk*", "The Humanist", No. 4, (1953), at pp. 172-186).

[26] Brief of *Amicus Curiae, Engineers and Scientists of America,* pp. 9-12; "*Report on the Ft. Monmouth Security Investigations, August, 1953—April, 1954,*" sponsored by the Federation of American Scientists, April 25, 1954, pp. 5-1 to 5-14.

[27] Gellhorn, "*Security, Loyalty and Science,*" Cornell University Press, (New York, 1950), pp. 55-62, 203-224; Gellhorn, "*Security, Secrecy and the Advancement of Science*" in "*Civil Liberties under Attack,* University of Pennsylvania Press, (Philadelphia, 1951), pp. 85-106).

seek private employment.[28] As expressed by George Kennan, former counselor to the State Department: " 'The atmosphere of public life in Washington does not have to deteriorate much further to produce a situation in which very few of our more quiet and sensitive and gifted people will be able to continue in government . . . the margin of safety with which our country moves today is not great enough to permit us to be reckless and wasteful with the talents and the idealism of those people we depend on for the generalship of our peacetime battles.' " (quoted in Barth *"The Loyalty of Free Men,"* Viking Press (New York, 1950), (Cardinal Ed.), p. 19).

4. Denuded the federal civil service of courageous and independent men, willing to question policy laid down from the top.[29]

5. Discouraged our best talents and minds from entering government service in the first place.[30]

With fair procedures, government employees need no longer fear the faceless accuser, the fantastic allegation, the charge to which one can give no answer except to state under oath that it is not so. With fair procedures, perhaps our most able minds and talents will not hesitate to undertake important and vital jobs upon which our very survival may depend. If the existing loyalty-security procedures do not present a greater risk to the "national security" than the alleged need for protecting confidential informers, we respectfully submit that the term has lost its meaning (cf. Barth, *"The Loyalty of Free Men," Viking Press,* (New York, 1950), (Cardinal Ed.) pp. 130-134).

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[28] *"The Federal Government Service,"* Sixth American Assembly, Arden House (1954), pp. 129-130.

[29] Commager, *"Freedom, Loyalty, Dissent"*, Oxford University Press, (New York, 1954), pp. 15, 19.

[30] Emerson and Helfeld, *"Loyalty Among Government Employees,"* 58 Yale L. J. 1, at p. 142; Barth *"The Loyalty of Free Men," Viking Press,* (New York, 1950), (Cardinal Ed.) p. 133).

Five veteran diplomats have stated our position with amazing clarity.

> "Recently the Foreign Service has been subjected to a series of attacks from outside sources which have questioned the loyalty and the moral standards of its members. With rare exceptions the justification for these attacks has been so flimsy as to have no standing in a court of law or in the mind of any individual capable of differentiating repeated accusation from even a reasonable presumption of guilt. Nevertheless these attacks have had sinister results.
>
> "The conclusion has become inescapable, for instance, that a Foreign Service officer who reports on persons and events to the very best of his ability and who makes recommendations which at the time he conscientiously believes to be in the interest of the United States may subsequently find his loyalty and integrity challenged and may even be forced out of the service and discredited forever as a private citizen after many years of distinguished service. A premium therefore has been put upon reporting and upon recommendations which are ambigiously stated or so cautiously set forth as to be deceiving.
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> "When any such tendency begins its insidious work it is not long before accuracy and initiative have been sacrified to acceptability and conformity. *The ultimate result is a threat to national security.*" (Norman Armour, Robert Woods Bliss, Joseph C. Grew, William Phillips, and G. Howland Shaw, *Letter to the "New York Times,"* January 17, 1954). (Emphasis supplied.)

"National security" is not a prop which may support the government's case. Rather it is the test which demands that loyalty-security procedures be fair in order that our public servants be permitted to serve the Nation with freedom from fear; not only "from the innocently mistaken in-

former, but also [from] a malicious or demented one" as well.

Respectfully submitted,

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